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<b>From</b>		<b>To</b>	
Ann Campbell/DC/USEPA/US		John Pomponio/R3/USEPA/US@EPA John Forren/R3/USEPA/US@EPA Jeffrey Lapp/R3/USEPA/US@EPA	
<b>CC</b>		<b>BCC</b>	
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Fw: NMA letters		08/19/2009 12:21 PM	
<b># of Attachments</b>	<b>Total Bytes</b>	<b>NPM</b>	<b>Contributor</b>
2	96,001		Jeffrey Lapp
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Body

### Document Body

Here you go friends. To the best of my knowledge there was no response to the July letter.

----- Forwarded by Ann Campbell/DC/USEPA/US on 08/19/2009 12:20 PM -----

From: Brian Frazer/DC/USEPA/US  
 To: Ann Campbell/DC/USEPA/US@EPA  
 Cc: David Evans/DC/USEPA/US@EPA, Suzanne Schwartz/DC/USEPA/US@EPA  
 Date: 08/19/2009 12:15 PM  
 Subject: Fw: NMA letters

Ann -

Here are the July 30th and August 18th Letters from NMA.

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Brian M. Frazer, Chief  
Wetlands & Aquatic Resources Regulatory Branch  
Office of Wetlands, Oceans and Watersheds  
U.S. EPA  
1200 Pennsylvania Avenue, NW (MC 4502T)  
Washington, DC 20460  
202-566-1652

----- Forwarded by Brian Frazer/DC/USEPA/US on 08/19/2009 11:20 AM -----

From: "Bennett, Karen" <KBennett@nma.org>  
To: Brian Frazer/DC/USEPA/US@EPA  
Date: 08/19/2009 10:37 AM  
Subject: NMA letters

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Here you go

Karen Bennett, Esq.  
Vice President, Environmental Affairs  
National Mining Association  
101 Constitution Ave NW Suite 500 East  
Washington, DC 20001  
(202) 463-3240



8-18-09\_Sussman Letter.pdf July 30 Letter to Robert Sussman.pdf

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**BRUCE WATZMAN**  
*Senior Vice President, Regulatory Affairs*

August 18, 2009

Mr. Robert Sussman  
Senior Policy Advisor  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20004

Dear Mr. Sussman:

I am writing to express the continued concerns of the National Mining Association (NMA) with the extralegal process the Environmental Protection Agency (EPA) is employing to review Clean Water Act (CWA), Section 404 applications for coal mining. On July 30, 2009, I wrote to outline our objections to EPA's use of a tool, Multi-Criteria Integrated Resource Assessment (MIRA), to screen Section 404 applications for later use of an "enhanced" permitting process that will substitute for the one codified under the applicable regulations at 30 C.F.R. Part 325.

Despite our grave concerns with the appropriateness of the MIRA criteria for screening Section 404 applications (and without first being opened to public notice and comment), we recently learned that, without providing any response to NMA's July 30 letter, EPA intends to move quickly to implement the use the MIRA. Reportedly, the EPA regions are working to establish a threshold that will determine: (1) the level of review each permit will require; (2) whether additional EPA-driven special conditions will apply to a permit and; (3) ultimately whether a permit is issued. As evidenced by recent information request letters from EPA Regions III, IV and V to applicants, EPA is moving forward with the use of MIRA. The regions have solicited verification of project-specific information, copies of actual surface mining and Section 404 permits and even "missing" information from applications that the Army Corps has already deemed complete under 30 C.F.R. § 325.2. We believe that EPA lacks authority to issue such requests, as Part 325 clearly gives the Corps authority to determine whether an application is complete and, if not, notify the applicant of the information necessary for a complete application. 30 C.F.R. § 325.2(3).

EPA's data request raises a number of additional concerns. With regard to the request to verify project-specific information that EPA intends to use to conduct the MIRA review process, EPA's intent to ensure the information is correct does not rehabilitate the MIRA process. EPA has failed to explain precisely how such data, correct or not, will be used in the MIRA analysis and how EPA will ensure that its application of MIRA will not compromise the U.S. Army Corps of Engineers (Corps) "independent" authority to make Section 404 permitting decisions. See 30 C.F.R. 325.2(e)(3) ("the applicant's rights to . . . an independent decision by the district of division engineer must be strictly observed"). EPA must provide a fully transparent explanation of how the "verified" data it seeks will be "scored" for purposes of application of the MIRA model, as well as any threshold values that EPA has established to determine which Section 404 permits will be reviewed under its (non-codified) "enhanced coordination" process. Furthermore, to ensure a transparent process, EPA must make public any reports related to permits that have already been scrutinized under the MIRA.

EPA's request for "missing information" is even more troubling. In the case of permit applications awaiting approval, there is simply no such thing as missing data. If any data were missing, the applications could not be deemed complete under existing permit regulations. When applications are incomplete, the applicable regulatory authority will contact the applicant for the additional data. Only complete permit applications can be considered under the governing regulations. In the case of the Section 404 permit, the Corps must make a completeness determination within 15 days of receipt of an application pursuant to the Corps' regulations at 33 C.F.R. 325.2. These regulations require the Corps to notify the applicant regarding whether an application is complete or whether additional information is required. There is no authority for EPA to solicit additional or "missing" information from an applicant.

Finally, if EPA desires to review additional information, not required by the governing regulatory programs, then EPA must also evaluate, consistent with the Paperwork Reduction Act (PRA) of 1995, the increased burden that will be imposed by that request. The agency's information demands clearly constitute a "collection of information" subject to the requirements of the Paperwork Reduction Act (PRA). The PRA prohibits federal agencies from conducting a collection of information unless the agency has reviewed and evaluated the request and the burden it would impose, submitted it to the Director of the Office of Management and Budget (OMB) for review, and received approval and a valid OMB control number from the Director. 44 U.S.C. §§ 3506(c); 3507(a). EPA has provided no evidence that it has reviewed its information collection request, submitted it to OMB or received a valid OMB control number authorizing its collection. Accordingly, NMA requests any documents in EPA's possession that demonstrate compliance with the PRA.

NMA remains seriously concerned that EPA's use of the MIRA circumvents the duly enacted procedures by which the Corps meets its statutory requirements for issuing Section 404 permits under the CWA. EPA's new process turns the established

Robert Sussman  
August 18, 2009  
Page Three

procedures for reviewing Section 404 permits on their head by replacing a transparent process that includes opportunity for comment and coordination with other agencies with a new process that hinges on an untested analytical tool never designed for use in permit decisions. Based on the legal and policy concerns raised above, NMA requests that EPA cease attempts to implement the use of the MIRA in this impermissible way.

A new review process for Section 404 permits is simply unnecessary and, given the closed-door manner in which this new process is being developed, will defeat the public's reasonable expectations regarding the legal process with which it must comply. We are, moreover, concerned that this new process will ultimately adversely impact the coal industry's ability to obtain the Section 404 permits necessary to maintain and create thousands of highly paid jobs and provide needed sources of energy.

We look forward to receiving your written response addressing the concerns raised in this letter and our letter of July 30.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bruce Watzman".

Bruce Watzman

Cc: The Honorable Lisa Jackson, EPA Administrator  
The Honorable Nancy Sutley, Council of Environmental Quality



**BRUCE WATZMAN**  
*Senior Vice President, Regulatory Affairs*

July 30, 2009

Mr. Robert Sussman  
Senior Policy Advisor  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20004

Dear Mr. Sussman:

Thank you for the opportunity for the National Mining Association (NMA) to meet with you and other representatives of the Environmental Protection Agency (EPA) to learn about the new process and standards the agency is developing for review of coal mining Clean Water Act (CWA) § 404 applications. We must express our grave concerns with the agency's plans to proceed with a new process and requirements that so significantly depart from those established under the duly promulgated regulations. Moreover, we fail to see how the proposed process will provide the clarity and certainty necessary for preparing future applications designed to meet the currently applicable regulatory requirements.

When we met previously with EPA on April 22, 2008, approximately 150 coal mine permit applications were pending before the Corps. Most recently, members of the congressional delegations in various coal mining states were advised by the Corps that 235 permit applications are now pending. The process EPA presented at our recent meeting will only further exacerbate a rapidly growing backlog of permit applications pending before the Army Corps of Engineers.

As we understand from the meeting, EPA is unilaterally establishing a new standard using the Multi-Criteria Integrated Resource Assessment (MIRA). The new standard will be in the form of a threshold for mining impacts. The threshold will become the benchmark for a bi-furcated process that: (1) allows permits below the threshold to proceed through the current Corps permit procedures set forth in 33 CFR Part 325; and (2) diverts permits above the threshold into a new process where EPA meets separately with the applicants to reach "agreements" that will allow the application to proceed through the existing Corps Part 325 procedures with the understanding the "agreements" with EPA will be incorporated in the final Corp permit.

Our concerns arise from how the new EPA process changes the procedures established under applicable regulations and effectively commandeers the Corps' statutory role for permitting discharges governed by CWA § 404. The Clean Water Act delegates to the Corps the authority for permitting the discharge of dredged or fill material. The regulations promulgated to implement the Corps' § 404 permitting program provide specific procedures and criteria for guiding the Corps' decisions. 30 CFR Part 325.

Mr. Robert Sussman  
Senior Policy Advisor  
July 23, 2009  
Page Two

Those regulations are specific about the timing and sequence of each step in the evaluation process, including participation through comments and coordination with other agencies. Moreover, throughout the process, the "Corps alone is responsible for reaching a decision on the merits of any application." *Id.* at § 325.2(a) (3).

This new process circumvents all of these regulations that establish a clear and transparent process with timelines. Now, EPA will be the first point of decision making, determining whether, when and how permit applications can be evaluated by the Corps—and, in many instances, what the final permit decision must look like before the Corps commences its evaluation. This is not the process established under the statute and implementing regulations.

As for the centerpiece of this new process, MIRA is not a tool designed for discrete permitting decisions. Rather, MIRA is an analytical approach for developing policy options through an "ongoing process rather than a discrete event." The output is not a "decision but information that spurs discussion, debate, learning, and consensus building." Stahl et al., "A New Approach to Environmental Decision Analysis: Multi-Criteria Integrated Resource Assessment (MIRA)," *Bulletin of Science, Technology & Society*, Vol. 22, No. 6, Dec. 2002, 443 at 457.

The Corps' § 404 permitting process calls for a discrete event—a permit decision that applies the criteria and follows the sequence and timing set forth in the agency's regulations. As such, NMA objects to using the 235 pending coal mine permit applications as the agency's laboratory for contorting a consensus-building tool into the discrete process and decision making required for CWA § 404 permit applications.

Too much is at stake—thousands of high-wage jobs, the well-being of families and communities that depend on those jobs and the coal supply chain that provides the reliable and affordable energy necessary to grow our economy. We urge EPA and the Corps to follow the regulations and move expeditiously to eliminate the permit backlog as quickly as possible.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce Watzman". The signature is fluid and cursive, with the first name "Bruce" and last name "Watzman" clearly distinguishable.

Bruce Watzman, Senior Vice President, Regulatory Affairs

cc: The Honorable Terrence Salt, Acting Assistant Secretary (Civil Works)  
The Honorable Nancy Sutley, Director, Council on Environmental Quality